84-1369

No. ———

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1984

MANHATTAN COFFEE COMPANY,
Petitioner,

v.

INTERNATIONAL BROTHERHOOD OF TEAMSTERS, CHAUFFEURS, WAREHOUSEMEN AND HELPERS OF AMERICA, LOCAL NO. 688,
Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

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February 28, 1985

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QUESTIONS PRESENTED

1. Whether the decision of the United States Court of Appeals for the Eighth Circuit below, which affirmed enforcement of a labor arbitrator's award holding that the award "drew its essence" from the applicable collective bargaining agreement, conflicts with the precedent of this Court to the grave detriment of the integrity of the arbitral process where the arbitrator found that petitioner's actions were taken in good faith and "uncontrovertedly based on sound business considerations" and then unilaterally, without argument, evidence or testimony, amended the collective bargaining agreement and excised the "sound business considerations" proviso to the subcontracting clause holding that the proviso is inapplicable to the workers covered by the collective bargaining agreement.

2. Whether this Court's principles governing judicial review of labor arbitrators' awards set forth 25 years ago in the *Steelworkers Trilogy* and, specifically, in *United Steelworkers of America v. Enterprise Wheel & Car Corp.*, 363 U.S. 593 (1960), are vague enough to enable reviewing courts to escape their mandated responsibility of ensuring that labor arbitrators' awards are faithful to the underlying labor agreement, and should be clarified to provide guidance to reviewing courts in order to avoid enforcement of labor arbitration awards based on an arbitrator's unilateral amendment or excision of a term of the underlying collective bargaining agreement as in the present case.

PARTIES BELOW

Parties to this case in the court below are those listed in the caption of this petition. The union herein is the bargaining representative of the hourly employees of petitioner at petitioner's St. Louis operations in two separate collective bargaining units. The union is a party to this case as representative of grievant Ms. Schwenck, a member of the office and clerical bargaining unit.

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Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

Petitioner Manhattan Coffee Company respectfully prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Eighth Circuit entered in this proceeding.

OPINIONS BELOW

The opinion of the court of appeals, with dissent of Judge McMillian, affirming the district court order and opinion, reported at 743 F.2d 621 (8th Cir. 1984), and the order of the court of appeals denying, by five-to-four vote, petitioner's petition for rehearing *en banc*, not reported, are set out at Appendices A and B, respectively. The opinion and order of the district court, reported at 571 F. Supp. 347 (E.D. Mo. 1983), are set out at Appendices C and D, respectively.

JURISDICTION

The judgment of the court of appeals was entered on September 18, 1984. A timely petition for rehearing and suggestion for rehearing *en banc* was denied by five-to-four vote by order entered on October 31, 1984. On January 24, 1985, by order of this Court, petitioner's time in which to file a petition for writ of certiorari was extended from January 29, 1985 to and including February 28, 1985, and this petition was filed on that date. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS

Section 301(a) of the Labor Management Relations Act, 29 U.S.C. § 185(a), provides in pertinent part:

> (1) Suits for violation of contracts between an employer and a labor organization representing employees in an industry affecting commerce as defined in this chapter, or between any such labor organizations, may be brought in any district court of the United States having jurisdiction of the parties, without respect to the amount in controversy or without regard to the citizenship of the parties.

Section 10 of the United States Arbitration Act, 9 U.S.C. § 10 provides in pertinent part:

> In either of the following cases the United States court in and for the district wherein the award was made may make an order vacating the award upon the application of any party to the arbitration—
>
> • • • •
>
> (d) Where the arbitrators exceeded their powers, or so imperfectly executed them that a mutual, final, and definite award upon the subject matter submitted was not made.

Section 8(d) of the National Labor Relations Act, 29 U.S.C. § 158(d), provides in pertinent part:

(d) For the purposes of this section, to bargain collectively is the performance of the mutual obligation of the employer and the representative of the employees to meet at reasonable times and confer in good faith with respect to wages, hours, and other terms and conditions of employment, or the negotiation of an agreement, or any question arising thereunder, and the execution of a written contract incorporating any agreement reached if requested by either party, but such obligation does not compel either party to agree to a proposal or require the making of a concession: *Provided*, That where there is in effect a collective-bargaining contract covering employees in an industry affecting commerce, the duty to bargain collectively shall also mean that no party to such contract shall terminate or modify such contract, . . .

STATEMENT OF THE CASE

A. Introduction.

This case was initiated pursuant to a complaint filed by Manhattan Coffee Company (herein "company" or "Manhattan") under section 301 of the Labor Management Relations Act, 29 U.S.C. § 185, and the United States Arbitration Act, 9 U.S.C. §§ 9, 10, 11, seeking to vacate an arbitrator's award. The International Brotherhood of Teamsters, Chauffeurs, Warehousemen & Helpers of America, Local 688 (herein "union"), the union representing the company's office and clerical workers and another unit of warehouse and equipment repair workers, filed a counterclaim to enforce the award. The district court, following cross-motions for summary judgment, entered an order enforcing the arbitrator's award. The company filed a notice of appeal to the United States Court of Appeals for the Eighth Circuit seeking reversal of the district court's decision for the reason that the arbitrator exceeded his authority by excising the "sound business considerations" proviso of the subcontracting clause in the

parties' contract. The union cross-appealed from the district court's refusal to grant attorneys' fees to the prevailing party. A three-judge panel of the Eighth Circuit affirmed the district court's decision, with Judge McMillian filing a dissent in which he would have vacated the underlying labor arbitrator's award for the reasons argued by petitioner. The company filed a petition for rehearing *en banc* which was denied by five judges; four of the judges would have granted the petition.

B. Findings of Fact by the Panel of the Eighth Circuit.

The undisputed facts as found by the panel of the Eighth Circuit are as follows:

> The Manhattan Coffee Company (the company) and the International Brotherhood of Teamsters, Chauffeurs, Warehousemen & Helpers of America, Local Union No. 688 (the union), are parties to a collective bargaining contract covering the company's office and clerical workers for the period July 1, 1982 through June 30, 1985. A separate but similar contract covers the company's warehouse and service maintenance workers. The main bone of contention now is Article 28 of the grievant's contract, entitled 'Subcontracting':
>
> > The Employer agrees that no function or service presently performed, or hereafter assigned, to the bargaining unit shall be subcontracted, leased, assigned or conveyed in whole or in part to any other person or organization, if any member of the bargaining unit is, at the time of such action, on layoff due to lack of work. The Employer agrees that the layoff proviso shall not be applicable until July 1, 1983.
> >
> > *The above language shall not be construed or interpreted to prohibit the Employer from* adding or *discontinuing* manufacture, packaging, or processing of a product or *performance of a*

service based on sound business considerations. [Emphasis added.]

[*See* Appendix E.]

Before July 1, 1983, the payroll and accounts payable functions were performed by the office and clerical unit of the company. On July 26, 1982, an employee, Patricia A. Schwenck, covered by the collective bargaining agreement, initiated a grievance while she was on layoff which alleged a contract violation by transfer of her work out of the bargaining unit to the production facility of the parent corporation in Oklahoma City.

The grievance was denied on July 27, 1982. There was a dispute as to whether the employee thereafter timely pursued proper procedures to appeal the denial. The matter went to arbitration before an impartial arbitrator, Richard L. Ross, who conducted a hearing and, on January 14, 1983, issued his opinion and award sustaining the grievance both as to arbitrability and on the merits. The arbitrator ordered the company to cease transferring the office bargaining unit work to the Oklahoma City plant and awarded grievant back pay from the date she filed the grievance.

The arbitrator specifically found that the company's decision to transfer the payroll and accounts payable work was taken in good faith and was based on sound business considerations. [Emphasis added.] The company was suffering because of severe economic problems and decided to cease the production of coffee in St. Louis. Sales volume had decreased by 65 percent even though the number of employees remained the same. The company and the union agreed that Manhattan would continue in St. Louis as a distribution warehouse, a service department, and an office, with a substantial reduction in personnel. The plan was implemented on June 30, 1983. With respect to the office, in issue here, the staff was reduced from ten to five. Four St. Louis employees were given severance pay and were terminated. Grievant

was placed on layoff at her election because, with her seniority, she expected to be the first recalled if needed.

Manhattan Coffee Co. v. International Brotherhood of Teamsters, Local 688, 743 F.2d 621, 622-623 (8th Cir. 1984).

C. Decisions of the Arbitrator, the District Court and the Court of Appeals.

The arbitrator held that the transfer of work was a violation of the parties' collective bargaining agreement. He ruled that although the company's actions were within the ambit of the "sound business considerations" exception to the subcontracting provision, that provision did not apply to the work of the office and clerical unit. No argument was made nor evidence submitted or testimony taken as to the inapplicability of the "sound business considerations" proviso to the office collective bargaining agreement. Rather, all parties at the hearing assumed its applicability to the only workers covered by the contract.

The district court upheld the arbitrator's decision, finding the decision to be based on 1) the ambiguity of the language of the "sound business considerations" proviso which was "subject to conflicting, reasonable interpretations when applied to the office bargaining unit" and 2) the parties' bargaining history. *Manhattan Coffee Co. v. International Brotherhood of Teamsters, Local No. 688*, 571 F. Supp. 347, 351 (E.D. Mo. 1983).

The Eighth Circuit Court of Appeals panel rejected the district court's finding that the arbitrator's award was based on bargaining and negotiating history, there being no record evidence to that effect. However, despite finding that the contract on its face appeared to apply only to office and clerical workers, the majority of the panel upheld the lower court's decision to enforce the award, finding that the award was based on a narrow but not impermissible reading of ambiguous contract language. They so found even though such a "reading" made the

contract provision inapplicable to the parties covered by the contract. The third member of the panel, dissenting, found that 1) the language was both unambiguous and, by the terms of the contract, solely applicable to the office unit work; 2) the arbitrator in effect amended the parties' contract; and, thus, 3) the arbitrator's decision could not be said to draw its essence from the collective bargaining agreement.

Petitioner then filed a petition for rehearing *en banc*. That petition was denied; however, four of the judges would have granted the petition.

REASONS FOR GRANTING THE WRIT

I. The Decision of the United States Court of Appeals for the Eighth Circuit Conflicts with the Precedent of This Court and Raises Questions Affecting the Integrity of the Arbitral Process by Affirming the Authority of an Arbitrator to Unilaterally Amend and Excise a Specific Term of a Collective Bargaining Agreement Where No Argument Was Made nor Evidence Presented to Support the Excision.

As this Court dictated 25 years ago in handing down the *Steelworkers Trilogy*, the role of the federal courts in reviewing a labor arbitrator's award is very narrow. This Court has declared that a court is not to redetermine the merits of the award, but to determine whether the award "draws its essence from the collective bargaining agreement." *United Steelworkers of America v. Enterprise Wheel & Car Corp.*, 363 U.S. 593, 597 (1960). An arbitrator's award is unenforceable where it deviates from the plain meaning of the contract and is unsupported by the contract or prior practices, *Detroit Coil Co. v. International Association of Machinists & Aerospace Workers, Lodge No. 82*, 594 F.2d 575, 579 (6th Cir.), *cert. denied*, 444 U.S. 840 (1979), or where the arbitrator undertakes in effect to amend the contract, to substitute his discretion for that of the parties, or to dispense

his own brand of industrial justice. *Enterprise Wheel*, 363 U.S. at 597; *Timken Co. v. Local Union No. 1123, United Steelworkers of America*, 482 F.2d 1012 (6th Cir. 1973). It is well settled that, while an arbitrator may construe ambiguous contract language, the arbitrator lacks authority to disregard or modify plain or unambiguous contract provisions. *See, e.g., International Brotherhood of Firemen & Oilers, Local No. 935-B v. The Nestle Company, Inc.*, 630 F.2d 474 (6th Cir. 1980); *Sears, Roebuck & Co. v. Teamsters Local Union No. 243*, 683 F.2d 154 (6th Cir. 1982), *cert. denied*, 460 U.S. 1023 (1983).

Mindful of this limited scope of review afforded labor arbitration decisions, but also of the principle set down by this Court that such decisions must draw their essence from the collective bargaining agreement, *Enterprise Wheel*, 363 U.S. at 597, petitioner requests that the decision of the Court of Appeals herein affirming enforcement of the arbitrator's award in the present case be reversed. That decision incorrectly affirms the authority of the arbitrator to amend the parties' collective bargaining agreement by excising a contract provision, namely a "sound business considerations" proviso to the agreement's subcontracting clause. Even the majority decision of the Eighth Circuit reversed the district court's finding that the arbitrator's award is based on record evidence. The arbitration award in question is incredible. Instead of drawing from the essence of the contract, the arbitrator erased any connection with the essence of the contract by, first, finding that the employer's actions in subcontracting work were taken in good faith and uncontrovertedly for sound business considerations and, second, holding that the "sound business considerations" proviso, which is part of the contract, does not apply to the workers covered by the contract. Such a decision is strained in any event, because the language he excised is contained in the contract. Moreover, the decision also is

impossible in this case where neither the company nor the union contested the proviso's applicability to the facts or its propriety in the contract, and, as the circuit court held, there is no record evidence of any kind upon which to base this award.

At issue in the present case is the extent of the arbitrator's authority with respect to altering the terms of the collective bargaining agreement under which he must make his decision. This Court set forth the scope of court review of an arbitrator's decision in *Enterprise Wheel*. There, this Court noted that the arbitrator "does not sit to dispense his own brand of industrial justice." *Id.* at 597. While the arbitrator may look for guidance from many sources, "his award is legitimate only so long as it draws its essence from the collective bargaining agreement." *Id.*

The arbitrator herein ruled that the provision in question has no application in the office collective bargaining agreement. Under his decision, the provision no longer exists in the contract. He did not find the provision applicable generally but inapplicable to the facts before him, nor did he find a failure to prove "sound business considerations." Rather, he found the provision inapplicable to office and clerical workers, the only workers covered by the contract. He modified the plain language of the contract by unilaterally obliterating it from the contract —based neither on record evidence nor even a union argument. The issue before him was whether there were sound business considerations justifying the subcontracting in question. He found affirmatively on that issue and then removed the provision from the contract. Such an award cannot "draw its essence" from the contract when it erases one of the contract terms.

Unlike the arbitration awards affirmed in previous Eighth Circuit decisions, the arbitrator here did not rely on 1) a construction of a common collective bargaining

agreement provision, *Lackawanna Leather Co. v. United Food & Commercial Workers*, 706 F.2d 228, 231 (8th Cir. 1983) (*en banc*); or 2) an understanding based on that of " 'an ordinary reader' of the English language," *United Food & Commercial Workers, Local 222 v. Iowa Beef Processors, Inc.*, 683 F.2d 283, 285 (8th Cir.), *cert. denied*, 459 U.S. 1088 (1982), in rendering his decision. Rather, the arbitrator herein ignored the common ordinary meaning of the contract term before him. *Webster's Third New International Dictionary* (unabridged 1971) defines "service" as the performance of work commanded or paid for. Under this commonly accepted definition of service, the term unambiguously covers office and clerical work. As the dissenting member of the Eighth Circuit panel herein stated, the contract at issue covers only the office and clerical unit and in that context must apply to the work by the office unit at issue here. *Manhattan Coffee*, 743 F.2d at 625 (McMillian, J., dissenting). Even the two-member majority of the panel conceded that the contract appeared on its face to apply only to the office and clerical employees, 743 F.2d at 623, although it refused to consider any impact that might have on whether there was a rational basis for the arbitrator's award. Indeed, the cover page and recognitional article both, unambiguously, indicate that the agreement applies only to the office and clerical workers. *See* Appendix E.

To permit an arbitrator to rewrite the parties' collective bargaining agreement by allowing him to choose to apply some but not other contract provisions as applicable to the parties to the agreement, as does the decision of the Eighth Circuit herein, threatens the entire arbitral process. To allow the arbitrator to amend the parties' agreement in this fashion not only flies in the face of this Court's precedent in *Enterprise Wheel*, but also produces results which are contrary to the basic concept of American labor relations law, namely, that the parties to a collective bargaining agreement are not compelled to ad-

here to a contract to which they have not agreed. *See* National Labor Relations Act § 8(d), 29 U.S.C. § 158(d). The decision of the Eighth Circuit in the present case introduces a level of uncertainty concerning the parties' rights to write their own agreements that could disrupt the collective bargaining process.

II. The Supreme Court's Principles Governing Judicial Review of Arbitration Awards Set Forth 25 Years Ago in the *Steelworkers Trilogy* and, Specifically, in *United Steelworkers of America v. Enterprise Wheel & Car Corp.*, 363 U.S. 593 (1960), Are Vague Enough to Enable Reviewing Courts to Escape Their Mandated Responsibility of Ensuring That Labor Arbitrators' Awards Are Faithful to the Underlying Labor Agreement and Should Be Clarified to Provide Guidance to the Reviewing Courts in Order to Avoid Enforcement of Awards Based on an Arbitrator's Amendment or Excision of a Term of the Underlying Collective Bargaining Agreement as in the Present Case.

In 1960, this Court set forth the principles governing arbitration in a labor relations setting that have since become known as the *Steelworkers Trilogy*. *United Steelworkers of America v. American Manufacturing Co.*, 363 U.S. 564 (1960); *United Steelworkers of America v. Warrior & Gulf Navigation Co.*, 363 U.S. 574 (1960); *United Steelworkers of America v. Enterprise Wheel & Car Corp.*, 363 U.S. 593 (1960). In those cases, this Court affirmed the preference of national labor policy for arbitration to resolve disputes between labor and management in a collective bargaining setting. Pursuant to the policy of preference for arbitration, this Court limited the scope of judicial action in a labor dispute covered by an arbitration agreement and declared that a determination on the merits of a dispute between parties to a collective bargaining agreement providing for arbitration was for the arbitrator, not the courts, to decide. Such a "plenary review by a court of the merits would

make meaningless the provisions that the arbitrator's decision is final, for in reality it would almost never be final." *Enterprise Wheel*, 363 U.S. at 599. However, this Court did not suggest that judicial review was to be a meaningless exercise. This Court mandated that federal courts defer to the decisions of arbitrators only when those decisions drew their essence from the underlying collective bargaining agreement:

> An arbitrator is confined to interpretation and application of the collective bargaining agreement: he does not sit to dispense his own brand of industrial justice . . . . He may, of course, look for guidance from many sources, yet his award is legitimate only so long as it draws its essence from the collective bargaining agreement. When the arbitrator's words manifest an infidelity to his obligations, courts have no choice but to refuse enforcement of the award.

363 U.S. at 597. These standards, however, are in themselves ambiguous—leaving open the question as to whether the reviewing court may look beyond the arbitrator's words to determine whether his award is faithful to the agreement. *See* Meltzer, *Ruminations About Ideology, Law, and Labor Arbitration*, 34 U. Chi. L. Rev. 545, 550 (1967).

The Second Circuit, considering the ambiguity in the standards of *Enterprise Wheel*, held that a court's review in an action to enforce or vacate an award involving the validity of the award should go beyond the rhetoric of the arbitrator's award to consider the fidelity of the award to the agreement. *Torrington Co. v. Metal Products Workers Local 1645*, 362 F.2d 677 (2d Cir. 1966). Relying on the admonitions of *Enterprise Wheel*, the Second Circuit held that the arbitrator's authority is subject to review, and the arbitrator's decision that he has authority should not be accepted by the reviewing court where the court can clearly perceive that his authority stems from sources outside the contract. 362

F.2d at 680. On this basis, the court overturned an arbitrator's award based on alleged past practice where the evidence clearly showed a revocation of that practice and negotiation of a new contract which did not incorporate the former practice. *Id.* The Sixth Circuit has also adopted an approach parallel to the Second Circuit. *International Brotherhood of Firemen & Oilers, Local No. 935-B v. The Nestle Company, Inc.*, 630 F.2d 474 (6th Cir. 1980).

The Eighth Circuit has not adopted the rationale of the Second Circuit or Sixth Circuit and has displayed an uncertainty as to the appropriate limits of their review as in the present case. The affirmance of the arbitration award herein came in a two-to-one decision which included a strongly worded dissent. Upon petitioner's application for rehearing *en banc*, the full Circuit denied petitioner's application in a five-to-four decision.

In the present case, the court's reluctance to look beyond the rhetoric of the arbitrator's award to determine the extent of the award's substantive faithfulness to the parties' agreement, and the court's uncertainty as to the legitimate extent of its review, have led to the anomalous result of imposing on the parties a collective bargaining agreement, different from the one they agreed on, namely a new agreement unilaterally amended by the arbitrator. Even though the panel majority conceded that the contract at issue appeared on its face to apply only to the office and clerical unit, in its reluctance to deal with the award's substantive infidelity to the underlying contract, it rejected that argument in favor of declaring that the arbitration ruling was "narrow" but not impermissible. We submit that this conclusion is error under the *Steelworkers Trilogy* precedent of this Court. We submit a different result would have occurred in both the Second and Sixth Circuits. *See, e.g., Torrington Co. v. Metal Products Workers Local 1645*, 362 F.2d 677 (2d Cir.

1966); *International Brotherhood of Firemen & Oilers v. The Nestle Company, Inc.*, 630 F.2d 474 (6th Cir. 1980).

Twenty-five years have passed since this Court considered the policy and judicial context of labor arbitration in the *Steelworkers Trilogy*. The present case presents a vehicle by which this Court can provide clarification of those principles set forth in the *Steelworkers Trilogy* and, specifically, *Enterprise Wheel*, in order to provide guidance to all federal courts and consistency between the circuits. Such guidance would enable the courts to ensure the substantive, not merely rhetorical, fidelity of such awards to the parties' collective bargaining agreements while maintaining the limited review of arbitration awards envisioned by this Court.

The risk of too much intervention by the courts in the merits of an award would be minimal if this Court provided guidance for appropriate exercise of judicial responsibility circumscribed by specific limitations. Professor Meltzer, in his article, *supra*, suggests that limitations modeled on the limitations on judicial review of master's findings in the federal courts could be adapted for judicial review of arbitration awards. Thus, the findings of the arbitrator would be respected unless they were manifestly erroneous and the award would be enforced unless it clearly lacked a rational basis in the agreement read in the light of the common law of the plant. *Meltzer, supra*, at 555. Professor Meltzer suggests several values to be achieved by this limited judicial responsibility, including heightened arbitrator sensitivity to the admonition of *Enterprise Wheel* regarding the source of the arbitrator's authority, increased willingness of employers to agree to arbitration clauses without demands for exclusions, and clearer, better reasoned opinions of arbitrators. *Id.* at 554.

The conviction on which Professor Meltzer bases his recommendations, and on which petitioner urges this

Court's review in the present case, is that arbitration, like other systems of adjudication, should not be able to invoke judicial power while denying judicial responsibility. We are mindful that enforcement of the national labor policy favoring arbitration demands that *de novo* judicial review be assiduously guarded against. Direction from this Court is needed as this issue has not been addressed in 25 years and the power of labor arbitrators to exercise authority without the accountability required of the federal judiciary or federal administrative agencies is in the balance. This Court's review and clarification of the *Enterprise Wheel* principles in the present case would provide the guidance to reviewing federal courts necessary to prevent enforcement of awards based on an arbitrator's amendment of or, as here, excision of contract provisions contained in, the underlying agreement, where only a contrived narrow reading without regard to the actual terms in the agreement would permit the conclusion that the award "drew its essence from the contract."

In the words of Professor Meltzer, arbitration should not be able to conscript judicial power while denying judicial responsibility. *Meltzer*, *supra*, at 566. The limited review and clarification requested here will strengthen the institution of arbitration. *Id.*

CONCLUSION

For the above-stated reasons, petitioner respectfully submits that this petition for a writ of certiorari should be granted.

Respectfully submitted,

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February 28, 1985

APPENDICES

APPENDIX A

UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

No. 83-2362-EM

No. 83-2428-EM

MANHATTAN COFFEE COMPANY,
Appellant-Cross Appellee,

v.

INTERNATIONAL BROTHERHOOD OF TEAMSTERS, CHAUFFEURS, WAREHOUSEMEN AND HELPERS OF AMERICA, LOCAL NO. 688,
Appellee-Cross Appellant.

Consolidated Appeal from the
United States District Court
for the Eastern District of Missouri

Submitted: May 14, 1984

Filed: September 18, 1984

Before McMILLIAN, BENNETT,* and ARNOLD, Circuit Judges.

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* The Hon. Marion T. Bennett, United States Circuit Judge for the Federal Circuit, sitting by designation.

BENNETT, Circuit Judge.

This case is on appeal from the judgment of the district court[1] which enforced an arbitration award under the terms of a collective bargaining agreement. A cross-appeal was filed from the refusal of the district court to allow attorney's fees to the prevailing party. We affirm.

The essential facts are undisputed. The Manhattan Coffee Company (the company) and the International Brotherhood of Teamsters, Chauffeurs, Warehousemen & Helpers of America, Local Union No. 688 (the union), are parties to a collective bargaining contract covering the company's office and clerical workers for the period July 1, 1982 through June 30, 1985. A separate but similar contract covers the company's warehouse and service maintenance workers. The main bone of contention now is Article 28 of the grievant's contract, entitled "Subcontracting":

> The Employer agrees that no function or service presently performed, or hereafter assigned, to the bargaining unit shall be subcontracted, leased, assigned or conveyed in whole or in part to any other person or organization, if any member of the bargaining unit is, at the time of such action, on layoff due to lack of work. The Employer agrees that the layoff proviso shall not be applicable until July 1, 1983.
>
> The above language shall not be construed or interpreted to prohibit the Employer from adding or discontinuing manufacture, packaging, or processing of a product or performance of a service based on sound business considerations.

Before July 1, 1983, the payroll and accounts payable functions were performed by the office and clerical unit of the company. On July 26, 1982, an employee, Patricia

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[1] The Hon. John F. Nangle, Chief Judge, United States District Court for the Eastern District of Missouri.

A. Schwenck, covered by the collective bargaining agreement, initiated a grievance while she was on layoff which alleged a contract violation by transfer of her work out of the bargaining unit to the production facility of the parent corporation in Oklahoma City.

The grievance was denied on July 27, 1982. There was a dispute as to whether the employee thereafter timely pursued proper procedures to appeal the denial. The matter went to arbitration before an impartial arbitrator, Richard L. Ross, who conducted a hearing and on January 14, 1983, issued his opinion and award sustaining the grievance both as to arbitrability and on the merits. The arbitrator ordered the company to cease transferring the office bargaining unit work to the Oklahoma City plant and awarded grievant back pay from the date she filed the grievance.

The arbitrator specifically found that the company's decision to transfer the payroll and accounts payable work was taken in good faith and was based on sound business considerations. The company was suffering because of severe economic problems and decided to cease the production of coffee in St. Louis. Sales volume had decreased by 65 percent even though the number of employees remained the same. The company and the union agreed that Manhattan would continue in St. Louis as a distribution warehouse, a service department, and an office, with a substantial reduction in personnel. The plan was implemented on June 30, 1983. With respect to the office, in issue here, the staff was reduced from ten to five. Four St. Louis employees were given severance pay and were terminated. Grievant was placed on layoff at her election because, with her seniority, she expected to be the first recalled if needed.

Issues of procedural arbitrability decided by the arbitrator and the district court are not before us. The substantive issue on appeal arises because, while the arbitrator found that the company's action in transferring

the payroll and accounts payable work to its home office master computer in Oklahoma was taken in good faith and was based on "sound business considerations," the latter exception to the subcontracting clause in Article 28 did not apply to the office and clerical unit but applied only to work performed by warehouse and equipment repair unit employees who were covered by a similar but separate contract.

The appeal challenges this interpretation of Article 28 as a "legal impossibility," arrived at *sua sponte* by the arbitrator without evidence in the record to support the conclusion that the "sound business considerations" exception, expressly included in the office and clerical unit contract at Article 28, was not intended to apply to the office and clerical unit. The company inquires how the exception can be considered surplusage in this case and apply only in the other contract. The company submits that the arbitrator has amended the contract and thus exceeded his authority, and that his award, affirmed by the district court, does not draw its essence from the contract.

The contract on its face appears to apply only to office and clerical employees, and it must be conceded that courts are not to redetermine the merits of an arbitration award but rather to determine whether the award draws its essence from the collective bargaining agreement. *United Steelworkers of America* v. *Enterprise Wheel & Car Corp.*, 363 U.S. 593, 597 (1960); *United Food & Commercial Workers, Local No. 222* v. *Iowa Beef Processors, Inc.*, 683 F.2d 283, 285 (8th Cir. 1982). Of course, the arbitrator cannot amend the contract, although he can construe ambiguous contract language if there is any. He cannot substitute his discretion for that of the parties, and he cannot assume existence of facts central to the award if there is no support therefor in the record. *Timken Co.* v. *Local Union No. 1123, United Steelworkers of America*, 482 F.2d 1012 (6th Cir. 1973).

The company states the law in the decided cases correctly in support of its argument that the arbitrator and the district court have misapplied the law in the instant case. The opinion of the district court concedes that the language of the Article 28 exception for "performance of a service" could "arguably cover the work performed by the office unit." But, the court upheld the arbitrator's construction of the phrase as one relating only to the work performed by the service department. Our task is to determine whether this was a reasonable construction of the contract language. We state it again, in pertinent part, with added emphasis:

> The above language shall not be construed or interpreted to prohibit the Employer from adding or discontinuing manufacture, packaging, or processing of a product or *performance of a service* based on sound business considerations. (Emphasis added.)

The arbitrator saw the underscored phrase in connection with the rest of the sentence pertaining to manufacture, packaging, and processing of the product, and concluded that the performance of a service must relate thereto and to the service unit and not to answering the telephone and to clerical work in the office as performed by the grievant. This is a narrow reading of the contract language but it is not impermissible. Indeed, the narrow construction was justified on the ground that, since reference to other activities in the exception was so specific and office work was not mentioned, it was therefore intended that it not be included. The district court found the language to be "ambiguous and subject to conflicting reasonable interpretations when applied to the bargaining unit," but found that the arbitrator's interpretation nevertheless drew its essence from the contract. We agree. To the extent that the decision under review also relied on "bargaining and negotiation history," we find it wanting in the record.

Having approved the conclusion of the district court that the arbitrator was correct in finding that the parties agreed to the transfer of production and service work but not to the transfer of office work, and that the transfer of work out of the office bargaining unit was violative of Article 28, we do not find it necessary, as the district court did not, to address other issues raised as to the contract language.

Back Pay.

The district court affirmed the arbitrator's award of back pay and it is not specifically challenged on appeal in the company's briefs. As with the main substantive issue of this case, any doubts are to be resolved in favor of the validity of the arbitrator's award. Judicial review of an arbitrator's award is extremely limited and if the award draws its essence from the collective bargaining agreement, it must be enforced even if the court would have reached a contrary result had it considered the matter in the first instance. These concepts flow from the strong and long-standing public policy favoring collective bargaining and arbitration of labor disputes, as shown in the statutes, 9 U.S.C. §§ 9, 10, 11, 29 U.S.C. § 171 (1982), and reiterated many times in judicial decisions. *See Nolde Brothers* v. *Local No. 358, Bakery & Confectionery Workers Union*, 430 U.S. 243, 254 (1977); *Steel Workers* v. *Enterprise Wheel & Car Corp.*, 363 U.S. at 599; *Iowa Beef Processors, Inc.* v. *Amalgamated Meat Cutters & Butcher Workmen of North America*, 627 F.2d 853, 856 (8th Cir. 1980); *Chauffeurs, Teamsters & Helpers Local No. 878* v. *Coca-Cola Bottling Co.*, 613 F.2d 716, 717 (8th Cir. 1980). We affirm the district court's judgment for back pay.

Attorney's Fees and Costs.

The district court awarded the union its costs but denied it attorney fees. The union has cross-appealed for

the fees and seeks a remand. The district court found that while the company's case was without merit, it was not frivolous. The arbitrator had found that the company's action had been taken in good faith and for efficiency and sound business reasons to save the company money at a time when it was in financial distress. The award or denial of attorney fees is a matter within the sound discretion of the trial court, absent abuse of that discretion. *General Drivers & Helpers Union No. 554* v. *Young & Hay Transportation Co.*, 522 F.2d 562, 568 (8th Cir. 1975). We find no abuse of judicial discretion here.

Affirmed.

McMILLIAN, Circuit Judge, concurring in part and dissenting in part.

I agree with the majority opinion that, to the extent the arbitrator's decision relied upon "bargaining and negotiation history," it is not supported by the record. I do not agree that the language of Article 28 is ambiguous, that the exception in Article 28 applies only to the production unit and not the office unit, or that the arbitrator's decision draws its essence from the collective bargaining agreement. For these reasons, I would reverse the judgment of the district court and remand with directions to the district court to dismiss the union's request for attorney's fees and costs.

The union is the bargaining representative for company employees in two separate bargaining units: the production unit, covering warehouse and service maintenance workers, and the office unit, covering office and clerical workers. Separate but similar collective bargaining agreements cover each bargaining unit. The collective bargaining agreement for the office unit is identified as such by the term "Office" on the cover page. *See* Ex. A. Article 3, sec. 1 of the collective bargaining agreement recognizes the union as the bargaining representative for "all of the office and clerical employees of the Employer, except buyers, salesmen, solicitors, confidential secretaries and pricing employees, executives, supervisors, and all others." The collective bargaining agreement for the office unit does not refer to the production unit and the two collective bargaining agreements are not by their terms interdependent.

Article 28 and the exception at issue are set forth in the majority opinion. Because this collective bargaining agreement covers *only the office unit*, I cannot agree with the arbitrator's construction of the phrase "performance of a service" in the exception to apply to work performed by service department employees *in the production unit*.

I admit that the parties could and should have used more specific terms when drafting this Article and the exception. Nonetheless, this collective bargaining agreement specifically covers the office unit employees and *in that context* I conclude that the exception must apply to the company's transfer of the payroll and accounts payable work. It is undisputed that the company transferred this work in good faith and on the basis of "sound business considerations." For these reasons, I believe the arbitrator has in effect amended the parties' contract and therefore the arbitrator's decision cannot be said to draw its essence from the collective bargaining agreement.

I would reverse the judgment of the district court.

A true copy.

ATTEST:

Clerk, U.S. Court of Appeals, Eighth Circuit

APPENDIX B

UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

September Term, 1984

Nos. 83-2362/2428-EM

MANHATTAN COFFEE COMPANY,
Appellant/Cross Appellee,

vs.

INTERNATIONAL BROTHERHOOD OF TEAMSTERS, CHAUFFEURS, WAREHOUSEMEN AND HELPERS OF AMERICA, LOCAL NO. 688,
Appellee/Cross Appellant.

Appeals from the United States District Court
for the Eastern District of Missouri

Appellant/cross appellee's petition for rehearing en banc has been considered by the Court and is denied.

Judges Ross, McMillian, Fagg and Bowman would have granted the petition.

Petition for rehearing by the panel is also denied.

October 31, 1984

APPENDIX C

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MISSOURI
EASTERN DIVISION

No. 83-838C(1)

MANHATTAN COFFEE COMPANY,
Plaintiff,

vs.

INTERNATIONAL BROTHERHOOD OF TEAMSTERS, CHAUFFEURS, WAREHOUSEMEN AND HELPERS OF AMERICA, LOCAL NO. 688,
Defendant.

[Filed Sep. 12, 1983]

MEMORANDUM

This case is now before this Court on cross-motions for summary judgment. Both parties assert that they are entitled to summary judgment pursuant to Rule 56 of the Federal Rules of Civil Procedure, because there are no genuine issues of material fact and they are entitled to judgment as a matter of law. *Fed.R.Civ.P.* 56.

1. *The Facts:*

Plaintiff brought this action seeking to set aside and vacate the award of an impartial arbitrator. Defendant filed a counterclaim seeking enforcement of the arbitrator's award and attorney's fees. Plaintiff and defendant

filed cross-motions for summary judgment which purport to dispose of both plaintiff's claim and defendant's counterclaim.

Plaintiff and defendant are parties to a collective bargaining contract covering plaintiff's office and clerical workers for the period July 1, 1982, through June 30, 1985. A separate collective bargaining contract covers plaintiff's warehouse and service maintenance workers. Article 28 of the contract, entitled "SUBCONTRACTING", provides:

> The Employer agrees that no function or service presently performed, or hereafter assigned, to the bargaining unit shall be subcontracted, leased, assigned or conveyed in whole or part to any other person or organization, if any member of the bargaining unit is, at the time of such action, on layoff due to lack of work . . . . The above language shall not be construed or interpreted to prohibit the Employer from adding or discontinuing manufacture, packaging, or processing of a product or performance of a service based on sound business considerations.

Article 18 of the contract provides for a four step grievance procedure. Step 1 requires that a grievance be filed with the employer within five (5) days of the occurrence. Step 2 requires the employer to rule on the grievance within five (5) days after receipt of same. Step 3 provides that if the grievance is not settled by steps 1 or 2, "it shall be submitted to a two (2) man Adjustment Board within three (3) working days." Art. 18, § 3. Finally, step 4 provides that the parties shall submit the grievance to arbitration if the Union so requests. If the matter is submitted to arbitration, the arbitrator:

> shall be limited to interpretation and application of this Agreement in any of its particulars, and any decision rendered within the scope of such limitation shall be final and binding on the parties of the agreement. Art. 18, § 6.

Prior to July 1, 1983, the payroll and accounts payable functions were performed by the office and clerical unit. On July 26, 1982, Patricia A. Schwenck (Grievant), an office employee covered by the parties' collective bargaining agreement, initiated a grievance. Grievant alleged that plaintiff had violated the contract by transferring the payroll and accounts payable work out of the bargaining unit, to the office of the parent corporation in Oklahoma City, while she was on layoff.

On July 27, 1982, plaintiff denied the grievance in writing, thus completing steps 1 and 2 of the grievance procedure. In addition, on July 27, 1982, grievant spoke on the telephone with her supervisor. The supervisor had called grievant to inquire why she had filed the grievance. Grievant responded by inquiring as to when a meeting, which was supposed to have been held within six (6) weeks after the contract went into effect on July 1, 1982, was going to be held.[1] The supervisor was unable to answer grievant and requested that she "sit tight" until Monday, August 2, 1982.

On Thursday, August 5, 1982, grievant requested that plaintiff waive step 3 of the grievance procedure and go directly to arbitration. On August 9, 1982, plaintiff refused to forego step 3 and informed defendant that grievant's time to request a step 3 two (2) man adjustment board had expired. Nevertheless, a two-man adjustment board meeting was held on August 25, 1982, but the board failed to resolve the grievance. Although plaintiff maintained that the grievance was not arbitrable, because steps 1 and 3 were not taken by grievant within the time

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[1] The new contract, effective July 1, 1982, resulted in several major changes in the size and composition of the bargaining units at plaintiff's St. Louis facility. Most notably, all production work was transferred to plaintiff's parent corporation and several warehousemen, servicemen, and office workers were laid off. The purpose of the six-week meeting was to assess the success of the new arrangement.

required by Article 18 of the contract, the parties agreed to submit the issue of arbitrability and the substantive contract issue to arbitration.

Richard L. Ross was the impartial arbitrator, and he conducted a hearing on the matter on December 7, 1982. On January 14, 1983, he issued his Opinion and Award sustaining the grievance as to both arbitrability (i.e., timeliness) and the merits. He ordered plaintiff to cease and desist from transferring the office bargaining unit work to plaintiff's parent corporation's offices. In addition, he awarded grievant backpay from the date of filing her grievance. *See Manhattan Coffee Company v. International Brotherhood of Teamsters, Chauffeurs, Warehousemen & Helpers of America, Local Union No. 688*, Jan. 14, 1983 (Ross, Arb.) (hereinafter "Arb. Op.").[2]

2. *The Law:*

The scope of judicial review of arbitrators' awards is extremely limited, because there is a strong federal policy favoring the non-judicial resolution of labor disputes. *Nolde Brothers, Inc., v. Bakery Workers Local 358*, 430 U.S. 243, 253-54 (1977); *Iowa Beef Processors v. Meat Cutters*, 627 F.2d 853, 856 (8th Cir. 1980); *Teamsters Local 878 v. Coca-Cola Bottling Company*, 613 F.2d 716, 717 (8th Cir. 1980); *Kewanee Machinery Division v. Teamsters Local 21*, 593 F.2d 314, 316-17 (8th Cir. 1979). The function of a reviewing court is not to redetermine the merits of the dispute, but rather to decide whether the arbitrator's award "draws its essence" from the contract. *Steelworkers v. Enterprise Wheel & Car Corp.*, 363 U.S. 593, 596-97 (1960); *United Food and Commercial Workers Local 222 v. Iowa Beef Processors, Inc.*, 683 F.2d 283, 285 (8th Cir. 1982). So long as the award has a rational basis rooted in the collective bargaining agreement, it must be enforced even if the court would have

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[2] For a more detailed description of the facts, *see Arb. Op.* at 2-6.

reached a contrary result had it considered the matter in the first instance. *Nolde Brothers, Inc., v. Bakery Workers Local 358, supra,* at 253-54; *Steelworkers v. Enterprise Wheel & Car Corp., supra,* at 599.

3. *Opinion:*

Plaintiff contends that the arbitration award must be set aside and vacated for three reasons: 1) the matter was not arbitrable because grievant did not comply with the time limits for processing her grievance; 2) the transfer of the office unit work did not violate the contract and the arbitrator's contrary conclusion resulted in an unlawful modification of the contract; and 3) the award of backpay was unwarranted because defendant expressly disclaimed any right to backpay for grievant. In addition, if summary judgment is entered in favor of defendant, plaintiff contends that defendant is not entitled to an award of attorney's fees by this Court, because plaintiff's initiation of this action was not in bad faith.

a) *Procedural Arbitrability:*

Plaintiff contends that the grievance was not arbitrable because steps 1 and 3 of the grievance procedure were not processed by grievant within the required time limits. The arbitrator held that the grievance was arbitrable because he found that step 1 was not processed late and that the untimeliness of step 3 was expressly waived by plaintiff. *Arb.Op.* at 7-10.

With respect to step 1, plaintiff argues that the grievance occurred on July 1, 1983, when plaintiff initially transferred the office work and, therefore, grievant's filing of her grievance on July 26, 1982, was not within five (5) days of the "occurrence" as required by Article 18, § 1. The arbitrator held that the transfer, if it was in violation of the contract, was a continuing "occurrence". *Arb.Op.* at 8. Therefore, the grievance filed on July 26, 1982, was timely. *Id.*

The arbitrator's interpretation of the term "occurrence" as it appears in Article 18, § 1 of the contract is a reasonable one. It is also supported by the facts and the evidence presented to the arbitrator. Moreover, the arbitrator's award of backpay was limited to from and after July 26, 1982, rather than July 1, 1982. Therefore, the arbitrator's conclusion that the grievance was procedurally arbitrable with respect to step 1 is upheld.

With respect to step 3, plaintiff argues that the finding that plaintiff waived the deliquency of step 3 both contravenes an express limitation in the contract and is without foundation in the facts. The arbitrator relied on several factors in reaching his conclusion that plaintiff waived the time requirements of step 3. These factors include: 1) the fact that a meeting was scheduled for six (6) weeks from the effective date of the contract, July 1, 1982, to discuss any problems related to the new arrangement; 2) the fact that grievant's supervisor told her to "sit tight" with regard to her grievance and the six-week meeting; and 3) the fact that plaintiff had actual notice of grievant's grievance. *Arb.Op.* at 9-10. In addition, the arbitrator relied on previous arbitration decisions to the effect that "discussion of the merits of a grievance waives the right of a party to rely on the technical procedural provisions of the contract." *Arb.Op.* at 9.

The arbitrator's finding that plaintiff waived the timeliness of step 3 is a reasonable finding based on the facts presented to him. The facts that the six-week meeting was intended to address problems closely related to grievant's grievance and that her supervisor told her to "sit tight" are a sufficient basis from which a waiver may be inferred. In addition, as the arbitrator noted, there is an ambiguity in the contract as to who holds the responsibility for submitting a grievance to the two-man adjustment board under step 3. *Arb.Op.* at 10. Under these circumstances, the arbitrator's finding of waiver is reasonable and is upheld.

Plaintiff's argument that the finding is invalid because it contravenes an express limitation in the contract fails to appreciate the nature of a waiver. Because plaintiff expressly waived the time limitation in step 3, plaintiff cannot be heard to rely on said limitation.

Finally, this Court notes that issues of procedural arbitrability are as much within the special competence of arbitrators as issues of substantive merit. *John Wiley & Sons, Inc., v. Livingston*, 376 U.S. 543, 557 (1964); *Automotive, Petroleum and Allied Industries Employees Union, Local No. 618, v. Town and Country Ford*, 709 F.2d 509 (8th Cir. 1983). *See also Ottley v. Sheepshead Nursing Home*, 688 F.2d 883, 890-1 (2d Cir. 1982) (refused to set aside arbitration award where arbitrator implicitly found that employer waived objection to timeliness of grievance). Because the arbitrator's conclusion that the grievance was procedurally arbitrable was both supported by the facts and was not unreasonable, this Court declines to vacate the arbitrator's award on the asserted ground that the grievance was not arbitrable.

b) *Substantive Merits:*

Plaintiff next contends that the arbitration award must be vacated, because the arbitrator's finding that plaintiff violated the contract when it transferred office work to Oklahoma City does not draw its essence from the contract and in fact results in an unlawful modification of the contract. The arbitrator held that the work transfer constituted a violation of the contract because the "sound business judgment" exception to the contract prohibition against work transfers did not apply to the work of the office of [sic] clerical unit. *Arb.Op.* at 10-14.

As discussed, *supra*, Article 28 of the contract prohibited the employer from subcontracting, leasing, assigning or conveying bargaining unit work while a unit member was on layoff. The prohibition also contains an exception for "adding or discontinuing manufacture, packaging, or proc-

essing of a product or *performance of a service* based on sound business considerations." (emphasis added). The arbitrator expressly found that the work transfer was based on sound business considerations. *Arb.Op.* at 11. However, he also found that the exception was not intended to apply to office unit work. *Id.* at 12. The arbitrator reasoned that the exception does not refer to the type of work regularly performed by the office staff. *Id.*

Although the language "performance of a service" could arguably cover the work performed by the office unit, the arbitrator rejected this construction. *Id.* He construed "performance of a service" to be limited to the work performed by the service department, *id.* at 12-13, and justified his construction on the ground that the other activities in the exception were very specific, such as manufacturing, packaging, product processing, and did not include office or clerical work. *Id.* Noting that "to expressly include one or more of a class must be taken as an exclusion of all others", *id.* at 12, the arbitrator concluded that a narrow construction of "performance of a service" was intended. He also justified his construction of the language by looking to the prior bargaining and negotiation history and finding an intention not to permit a transfer of office unit work. *Id.* at 13-14.

Having reviewed the briefs of the parties, the arbitrator's opinion and the contract itself, this Court is of the opinion that the arbitrator's construction of the contract is reasonable and supported by the facts. The language of the exception in Article 28 is ambiguous and subject to conflicting, reasonable interpretations when applied to the office bargaining unit.[3] In light of the ac-

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[3] It is also worth noting that it is not at all clear that the transfer of office unit work to another city falls within the activity permitted by the "sound business" judgment exception, namely "adding or discontinuing" the types of work enumerated. A reasonable interpretation of "discontinuing" is that it is intended to cover the situation where the employer no longer engages in or has a need for the types of activity enumerated. Because the payroll and accounts

companying terms of the exception and the bargaining history, it is not unreasonable to read "performance of a service" as not encompassing the work performed by the office employees. Because the arbitrator's conclusions with regard to violations of the contract draw their essence from the contract, they will not be disturbed or vacated by this Court.

c) *Award of Backpay:*

Plaintiff next takes issue with the arbitrator's award of backpay to grievant. Plaintiff contends that grievant is not entitled to backpay because grievant did not request it and because the union "specifically conceded that it had no right to such a remedy." *Plaintiff's Memorandum* at 11.

The arbitrator, however, states in his opinion that: "[Grievant]demanded full back pay and recall." *Arb.Op.* at 5. Because plaintiff has not directed this Court to any evidence that the arbitrator was corrupt, guilty of fraud or evident impartiality, 9 U.S.C. § 10, there is no basis for concluding that the award of backpay is so unreasonable that it should be set aside. Plaintiff does refer this Court to a passage in defendant's brief to the arbitrator, which brief is not before this Court, in which the union allegedly admits that it is not entitled to backpay for grievant. However, plaintiff also concedes that the arbitrator refused to consider defendant's brief because it was not timely filed. *Plaintiff's Memorandum* at 11. Therefore, any concession by the union, if there was one, was not before the arbitrator. Accordingly, the arbitrator's award of backpay was within his authority and this Court will not upset his reasonable exercise of that authority.

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payable work was not necessarily "discontinued" by plaintiff, but was merely transferred to the employees in the offices of its parent corporation, this is another permissible justification for the arbitrator's result, even though the arbitrator did not so justify his decision.

3) *Attorney's Fees and Costs:*

The final matter for consideration is defendant's claim for attorney's fees and costs in connection with the cause before this Court. Although defendant's argument that the present action defeats the purpose of submitting labor disputes to arbitration is appealing and pertinent, this Court is of the opinion that plaintiff's conduct is not so lacking in good faith as to require them to pay defendant's attorney's fees. Plaintiff's contentions were essentially meritless, but not quite frivolous. Accordingly, defendant's claim for attorney's fees is denied, but defendant's claim for costs is granted. *See Fed.R.Civ.P.* 54(d).

4. *Conclusion:*

The essential benefit of mandatory and binding arbitration clauses is the conservation of scarce judicial time and effort. Such benefit was not achieved in the instant case. Plaintiff is admonished to give more serious consideration to the scope of this Court's power to review arbitration awards, or else plaintiff may find itself paying defendant's attorney's fees in future such actions.

It is the judgment of this Court that the award of the arbitrator in this case is reasonable and draws its essence from the contract of the parties. Plaintiff is therefore ordered to comply with the award *in toto*. Defendant's claim for attorney's fees is denied. Defendant's claim for costs is granted. Plaintiff's motion for oral argument is denied pursuant to Local Rule 7(a). *E.D.Mo.R.* 7(a).

/s/ John F. Nangle
United States District Judge

Dated: September 12, 1983

APPENDIX D

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MISSOURI
EASTERN DIVISION

No. 83-838C(1)

MANHATTAN COFFEE COMPANY,
Plaintiff,

vs.

INTERNATIONAL BROTHERHOOD OF TEAMSTERS, CHAUFFEURS, WAREHOUSEMEN AND HELPERS OF AMERICA, LOCAL NO. 688,
Defendant.

[Filed Sep. 12, 1983]

ORDER

Pursuant to the memorandum filed herein this day,

IT IS HEREBY ORDERED that plaintiff's motion for summary judgment be and is denied.

IT IS FURTHER ORDERED that defendant's motion for summary judgment be and is granted.

IT IS FURTHER ORDERED that plaintiff comply *in toto* with the arbitrator's award in this case.

IT IS FURTHER ORDERED that defendant's claim for attorney's fees in connection with this action be and is denied.

IT IS FURTHER ORDERED that plaintiff's motion for oral argument be and is denied pursuant to Local Rule 7(a). *E.D.Mo.R.* 7(a).

IT IS FURTHER ORDERED that plaintiff pay defendant's costs in connection with this cause.

IT IS FURTHER ORDERED that summary judgment be and is entered for defendant and against plaintiff on both plaintiff's complaint and defendant's counterclaim.

IT IS FURTHER ORDERED that the parties' motions to remove this case from the trial docket be and are granted.

IT IS FURTHER ORDERED that the parties' motions for oral argument be and are denied pursuant to Local Rule 7(A). *E.D.Mo.R.* 7(A).

/s/ John F. Nangle
United States District Judge

Dated: September 12, 1983

APPENDIX E

AGREEMENT

Between

MANHATTAN COFFEE COMPANY
ST. LOUIS, MISSOURI

and

INTERNATIONAL BROTHERHOOD OF TEAMSTERS,
CHAUFFEURS, WAREHOUSEMEN & HELPERS
OF AMERICA
Local Union No. 688

(Office)

July 1, 1982
through
June 30, 1985

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Article 3

RECOGNITION

Section 1. The Employer agrees to recognize and does hereby recognize the Union, its agents, representatives, or successors, as the exclusive bargaining agency for all of the office and clerical employees of the Employer, except buyers, salesmen, solicitors, confidential secretaries and pricing employees, executives, supervisors, and all others.

Section 2. The Employer will neither negotiate nor make collective bargaining agreements for any of its employees in the bargaining unit covered hereby unless it be through duly authorized representatives of the Union.

Section 3. The Employer agrees that it will not sponsor or promote, financially or otherwise, any group or labor organization, for the purpose of undermining the Union; nor will it interfere with, restrain, coerce, or discriminate against, any of its employees in connection with their membership in the Union.

Article 4

REPRESENTATION

The Union shall be represented by Shop Stewards, the number being based on one steward for each twenty-five (25) employees or major fraction thereof. The Shop Stewards shall serve as a Grievance Committee and they shall be selected in any manner determined by the Union. The names of the Stewards shall be certified in writing by the Union to the Employer within ten (10) days after the signing of this Agreement.

The Committee shall meet with Management as often as necessary to consider grievances. No Steward shall be transferred from his or her department without further consultation and agreement with the Committee.

Article 28

SUBCONTRACTING

The Employer agrees that no function or service presently performed, or hereafter assigned, to the bargaining unit shall be subcontracted, leased, assigned or conveyed in whole or part to any other person or organization, if any member of the bargaining unit is, at the time of such action, on layoff due to lack of work. The Employer agrees that the layoff proviso shall not be applicable until July 1, 1983.

The above language shall not be construed or interpreted to prohibit the Employer from adding or discontinuing manufacture, packaging, or processing of a product or performance of a service based on sound business considerations.

Article 29

STRIKES AND LOCKOUTS

Section 1. It is mutually agreed that there shall be no strikes, lockouts, or stoppages of work during the life of this Agreement. The Union shall use every effort to prevent cessation of work by any of its members employed by the Employer, for any case, but especially for the following reasons:

(1) Sympathy Strikes; and

(2) General Strikes

The Employer and the Union will work toward harmonious cooperation so that no provocation either on the part of the Union or Employer representatives may lead to any disruption of operations.

Section 2. The right of the Employer or the Union to seek injunctive relief in court against action in breach of the strike and lockout clause without submission to the grievance and arbitration procedures of this article is expressly recognized by the parties.